Rules and Regulations

Federal Register
Vol. 53, No. 131
Friday, July 8, 1988

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2610

Payment of Premiums; Correction

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Interim rule; correction.

SUMMARY: This document corrects an interim rule on Payment of Premiums, 29 CFR Part 2610, that appeared at pages 24906 through 24919 in the **Federal Register** of Thursday, June 30, 1988 (53 FR 24906). This action is needed to correct an editorial error in that interim rule.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Office of the General Counsel (Code 22500), Pension Benefit Guaranty Corporation, 2020 K Street NW., Washington, DC 20006; telephone 202–778–8823. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The following correction is made in FR Doc. 88–14792 appearing on pages 24906 through 24919 in the issue of June 30, 1988:

§ 2610.34 [Corrected]

1. On page 24919, column two, line 26, the text of § 2610.34(b)(6) is corrected by substituting the word "fifteenth" for the word "last".

Note: An additional correction to this document is published elsewhere in the corrections sections of this issue of the **Federal Register**.

Dated: July 5, 1988.

Kathleen P. Utgoff,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 88–15414 Filed 7–7–88; 8:45 am]

BILLING CODE 7708–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6799]

List of Communities Eligible for the Sale of Flood Insurance; Iowa, et al.

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities were required to adopt floodplain management measures compliant with the NFIP revised regulations that became effective on October 1, 1986. If the communities did not do so by the specified date, they would be suspended from participation in the NFIP. The communities are now in compliance. This rule withdraws the suspension. The communities' continued participation in the program authorizes the sale of flood insurance.

EFFECTIVE DATE: June 3, 1988.

ADDRESS: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the NFIP at: P.O. Box 457, Lanham, Maryland 20706, Phone: (800) 638–7418.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646–2717, Federal Center Plaza, 500 C Street SW., Room 416, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding.

In addition, the Director of the Federal Emergency Management Agency has identified the Special Flood Hazard Areas in these communities by publishing a Flood Insurance Rate Map. In the communities listed where a flood map has been published, section 102 of the Flood Disaster Protection Act of 1973, as amended, requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the Special Flood Hazard Area shown on the map.

The Director finds that the delayed effective dates would be contrary to the public interest. The Director also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance."

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule, if promulgated will not have a significant economic impact on a substantial number of small entities. This rule provides routine legal notice stating the community's status in the NFIP and imposes no new requirements or regulations on these participating communities.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

PART 64—[AMENDED]

1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et. seq.*, Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

In each entry, the suspension for each listed community has been withdrawn. The entry reads as follows:

§ 64.6 List of eligible communities.

State	Community name	County	Community No.	Effective date
Iowa	Anita, City of	Cass	190048	June 3, 1988 Suspension withdrawn.
Do	Beford, City of	Taylor	190263	Do.
Do	Charlotte, City of	Clinton	190087	Do.
Do	Cherokee, City of	Cherokee	190063	Do.
Do	Clarksville, City of	Butler	190336	Do.
Do	Clive, City of	Polk	190488	Do.
Do	Correctionville, City of	Woodbury	190288	Do.
Do	Definance, City of	Shelby	190246	Do.
Do	Fertile, City of	Worth	190301	Do.
Do	Fort Madison, City of	Lee	190184	Do.
Do	Gilbertville, City of	Black Hawk	190021	Do.
Do	Gladbrook, City of	Tama	190516	Do.
Do	Janesville, City of	Black Hawk and Bremer	190023	Do.
Do	Lamoni, City of	Decatur	190110	Do.
Do	Lehigh, City of	Webster	190310	Do.
Do	Lowden, City of	Cedar	190054	Do.
Do	Lucas, City of	Lucas	190196	Do.
Do	Mapleton, City of	Monona	190208	Do.
Do	Maxwell, City of	Story	190257	Do.
Do	Newell, City of	Buena Vista	190334	Do.
Do	Pleasant Hill, City of	Polk	190489	Do.
Do	Roland, City of	Story	190513	Do.
Do	Sageville, City of	Dubque	190122	Do.
Do	Sioux Center, City of	Sioux	190658	Do.
Do	Smithland, City of	Woodbury	190300	Do.
Do	Spencer, City of	Clay	190071	Do.
Do	Story City, City of	Story	190259	Do.
Do	Sumner, City of	Bremer	190029	Do.
Do	Unionville, Town of	Appanoose	190923	Do.
Do	Victor, City of	Iowa and Poweshiek	190426	Do.
New York	Holland Patent, Village of	Oneida	360530	June 15, 1988 Suspension withdrawn.
Do	Huron, Town of	Wayne	360892	Do.
Do	Jay, Town of	Essex	360265	Do.
Do	Lebanon, Town of	Madison	360403	Do.
Do	Lexington, Town of	Greene	360284	Do.
Do	Lima, Town of	Livingston	360457	Do.
Do	Lincoln, Town of	Madison	360405	Do.
Do	Lyons, Town of	Wayne	361226	Do.
Do	Marathon, Village of	Cortland	360183	Do.
Do	Middlesex, Town of	Yates	360960	Do.
Do	Newark, Village of	Wayne	360894	Do.
Do	Pelham, Village of	Westchester	360925	Do.
Do	Pulaski, Village of	Oswego	360659	Do.
Do	Rensselaer Falls, Village of	St. Lawrence	361466	Do.
Do	Savona, Village of	Steuben	361049	Do.
Do	Sherburne, Town of	Chenango	360164	Do.
Do	Sherman, Town of	Chautauqua	361502	Do.
Do	Smyrna, Town of	Chenango	361308	Do.
Do	Sodus Point, Village of	Wayne	360899	Do.
Do	Speculator, Village of	Hamilton	361527	Do.
Do	Stockport, Town of	Columbia	361322	Do.
Do	Tivoli Village of	Dutchess	361507	Do.
Do	Valatie, Village of	Columbia	361508	Do.
Do	Valley Falls, Village of	Rensselaer	361469	Do.
Do	Wallkill, Town of	Orange	360634	Do.
Do	Wappingers Falls, Village of	Dutchess	360223	Do.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

Issued: July 1, 1988.

[FR Doc. 88-15329 Filed 7-7-88; 8:45 am]

BILLING CODE 6718-21-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 31

Referral of Debts to the Internal Revenue Service for Tax Refund Offset; Implementing the Deficit Reduction Act

AGENCY: Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: Section 2653 of the Deficit Reduction Act (the Act) authorizes the Secretary of the Treasury to offset the income tax refund due an individual taxpayer who has a delinquent debt obligation to the Federal Government when other collection efforts have failed to recover the amount due. This final rule implements the provisions of the Act for reporting an individual debtor to the Internal Revenue Service (IRS) so that an offset against an income tax refund can be effectuated. The procedure contains safeguards for the debtor, while enhancing the Department's ability to collect delinquent debts.

EFFECTIVE DATE: Effective date of rule August 8, 1988.

FOR FURTHER INFORMATION CONTACT: Alan M. Levit, (202) 245–6201.

SUPPLEMENTARY INFORMATION: On December 17, 1986, the Department solicited public comment on an interim rule implementing section 2653 of the Deficit Reduction Act (DRA) (31 U.S.C. 3720A) and its implementing regulations issued by the Department of the Treasury, Internal Revenue Service (IRS), at 26 CFR 301.6402–6T.

The Department received only one comment from an interested party, and a substantive revision was made to the interim rule upon consideration of the comment.

Section 31.1—Scope

The commenter was concerned with the issue of reporting to the IRS a debt for which the statute of limitations had lapsed. Such discharged debts are considered by the IRS to be income to the debtor. The commenter suggests that the procedural safeguards afforded debtors in general by the interim rule are not provided to those debtors whose debts are unenforceable solely due to the lapse of the limitations period for collecting the debt. However, section 61(a)(12) of the Internal Revenue Code and its implementing regulations at 26 CFR 1.61–12 provide that income arising from the discharge in whole or in part of a debt is to be included in the debtor's gross income for the year in which the debt is discharged. Therefore, since the Department is required to report such income to the IRS, the Departmental claims collection regulations, at 45 CFR 30.31(b), provide that the Secretary will report to the IRS, using Form 1099G, any amount over $600 which becomes uncollectible because the applicable limitations period expires. We have revised § 31.1(d) merely to reference this preexisting requirement.

E.O. 12291

This rule does not constitute a major rule as that term is defined in section 1(b) of Executive Order 12291 on Federal Regulation issued on February 17, 1981. Analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

In accordance with the provisions of section 605(b) of the Regulatory Flexibility Act, at 5 U.S.C. 603, the Undersigned certifies that this rule does not have a significant economic impact on a substantial number of small entities such as would require the development of a regulatory impact analysis. The Department recognizes that there may be increased costs to individuals as a result of this rule. However, such increases are imposed *only if* an individual is late in making payments to the Department. In addition, these procedures are mandated by section 2653 of the Deficit Reduction Act.

Reporting and Recordkeeping Requirements

Under section 3518 of the Paperwork Reduction Act of 1980 and 5 CFR 1320.3(c), the information collection provisions contained in these regulations are not subject to Office of Management and Budget review and approval.

List of Subjects in 45 CFR Part 31

Administrative practice and procedure, Claims.

Otis R. Bowen,

Secretary.

Date: May 11, 1988.

Accordingly, we hereby revise 45 CFR Part 31 as follows:

PART 31—REFERRAL OF DEBT TO IRS FOR TAX REFUND OFFSET

Sec.

Authority: 31 U.S.C. 3711, 3716, 3718; Section 2653 of the Deficit Reduction Act (31 U.S.C. 3720A); 26 CFR 301.6402–6T; and 45 CFR Part 30.

§ 31.1 Scope.

(a) The standards set forth in §§ 31.1 through 31.11 are the Department's procedures for requesting the Internal Revenue Service (IRS) to offset tax refunds due taxpayers who have a past due debt obligation to the Department. These procedures are authorized by the Deficit Reduction Act of 1984 (31 U.S.C. 3720A), as implemented by regulation at 26 CFR 301.6402–6T, and apply to the collection of debts as authorized by common law, by 31 U.S.C. 3716, or under other statutory authority.

(b) The Secretary will use the IRS tax refund offset to collect claims which are liquidated or certain in amount, past due and legally enforceable, and which are eligible for tax refund offset under regulations issued by the Secretary of the Treasury.

(c) Except as provided in paragraph (d) of this section, the Secretary will not report debts to the IRS except for the purpose of using the offset procedures described in §§ 31.1 through 31.11. Debts of less than $25.00, exclusive of interest and other charges, will not be reported.

(d) If not legally enforceable because of the lapse of the statute of limitations but otherwise valid, a debt amounting to over $600 will be reported to the IRS as a discharged debt on Form 1099G. (Form 1099G is an information return which Government agencies file with the IRS to report discharged debt, and the discharged amount is considered as income to the taxpayer.) [See § 31.9; 45 CFR 30.31(b).]

§ 31.2 Notice of requirements before offset.

A request for reduction of an IRS tax refund will be made only after the Secretary makes a determination that an amount is owed and past due and provides the debtor with 60 calendar days written notice. The Department's Notice of Intent to Collect by IRS Tax Refund Offset (Notice of Intent) will state:

(a) The nature and amount of the debt;

(b) That unless the debt is repaid within 60 calendar days from the date of the Department's Notice of Intent, the Secretary intends to collect the debt by requesting the IRS to reduce any amounts payable to the debtor as refunds of Federal taxes paid by an amount equal to the amount of the debt and all accumulated interest and other charges;

(c) That the debtor has a right to obtain review, within the Department, of the Secretary's initial determination that the debt is past due and legally enforceable (*See* § 31.3); and

(d) That the debtor has a right to inspect and copy departmental records related to the debt as determined by the Secretary and will be informed as to where and when the inspection and copying can be done after the Department receives notice from the

debtor that inspection and copying are requested (*See* § 31.5).

§ 31.3 Review within the Department of a determination that an amount is past due and legally enforceable.

(a) *Notification by debtor.* A debtor who receives a Notice of Intent has the right to present evidence that all or part of the debt is not past due or not legally enforceable. To exercise this right, the debtor shall send a letter notifying the applicable delegatee of the HHS Departmental Claims Officer specified in § 31.11 that the debtor intends to present evidence to a designated hearing officer. The letter must be received by such designated claims officer within 60 calendar days from the date of the Department's Notice of Intent.

(b) *Submission of evidence.* The debtor may submit evidence showing that all or part of the debt is not past due or not legally enforceable along with the notification required by paragraph (a) of this section. Failure to submit the notification and evidence within 60 calendar days will result in an automatic referral of the debt to the IRS without further action. Evidence submitted by a debtor who has requested prior review of a claim under 45 CFR Part 30 will not be reconsidered unless such evidence raises a new defense not considered in connection with such prior review.

(c) *Review of the record.* After a timely submission of evidence by the debtor, the claims officer will submit such evidence to a designated hearing officer, who will review all material related to the debt which is in possession of the Department. The hearing officer shall make a determination based upon a review of the written record, except that the hearing officer may order an oral hearing if the officer finds that:

(1) An applicable statute authorizes or requires the Secretary to consider waiver of the indebtedness and the waiver determination turns on credibility or veracity; or

(2) The question of indebtedness cannot be resolved by review of the documentary evidence.

§ 31.4 Determination of the hearing officer.

(a) Following the hearing or the review of the record, the hearing officer shall issue a written decision which includes the supporting rationale for the decision. The decision of the hearing officer concerning whether a debt or part of a debt is past due and legally enforceable i the final agency decision with respect to the past due status and enforceability of the debt.

(b) Copies of the hearing officer's decision will be distributed to the designated claims officer, the Department's Office of the Assistant Secretary for Management and Budget, the debtor, and the debtor's attorney or other representative, if any.

(c) If the hearing officer's decision affirms that all or part of the debt is past due and legally enforceable, the Secretary will notify the IRS after the hearing officer's determination has been issued under paragraph (a) of this section and a copy of the determination is received by the Department's Office of the Assistant Secretary for Management and Budget. No referral will be made to the IRS if review of the debt by the hearing officer reverses the initial decision that the debt is past due and legally enforceable.

§ 31.5 Review of departmental records related to the debt.

(a) *Notification by debtor.* A debtor who intends to inspect or copy departmental records related to the debt as determined by the Secretary must send a letter to the designated claims officer stating the debtor's intention. The letter must be received by the designated claims officer within 60 calendar days from the date of the Department's Notice of Intent.

(b) *Department's response.* In response to timely notification by the debtor as described in paragraph (a) of this section, the designated claims officer will notify the debtor of the location and time when the debtor may inspect or copy departmental records related to the debt. At his or her discretion, the designated claims officer may also mail copies of the debt-related records to the debtor.

§ 31.6 Stay of offset.

If the debtor timely notifies the Secretary that the debtor is exercising a right described in § 31.3(a) and timely submits evidence pursuant to § 31.3(b), any notice to the IRS will be stayed until the issuance of a written decision by the hearing officer which determines that a debt or part of a debt is past due and legally enforceable.

§ 31.7 Application of offset funds: single debt.

If the debtor does not timely notify the Secretary that the debtor is exercising a right described in § 31.3, the Secretary will notify the IRS of the debt 60 calendar days from the date of the Department's Notice of Intent, and will request that the amount of the debt be offset against any amount payable by the IRS as refund of Federal taxes paid. Normally, recovered funds will be applied first to any special charges provided for in HHS regulations or contracts, then to interest, and finally, to the principal owed by the debtor.

§ 31.8 Application of offset funds: multiple debts.

The Secretary will use the procedures set out in § 31.7 for the offset of multiple debts. However, when collecting on multiple debts the Secretary will apply the recovered amounts against the debts in order in which the debts accrued.

§ 31.9 Application of offset funds: tax refund insufficient to cover amount of debt.

If a tax refund is insufficient to satisfy a debt in a given tax year, the Secretary will recertify to the IRS on the following year to collect further on the debt. If, in the following year, the debt has become legally unenforceable because of the lapse of the statute of limitations, the debt will be reported to the IRS as a discharged debt in accordance with § 31.1(d) and 45 CFR 30.31(b).

§ 31.10 Time limitation for notifying the IRS to request offset of tax refunds due.

(a) The Secretary may not initiate offset of tax refunds due to collect a debt for which authority to collect arises under 31 U.S.C. 3716 more than 10 years after the Secretary's right to collect the debt first accrued, unless facts material to the Secretary's right to collect the debt were not known and could not reasonably have been known by the officials of the Department who were responsible for discovering and collecting such debts.

(b) When the debt first accrued is determined according to existing law regarding the accrual of debts. (*See*, for example, 28 U.S.C. 2415.)

§ 31.11 Correspondence with the Department.

(a) All correspondence from the debtor to the Secretary concerning the right to review as described in § 31.3 shall be addressed to the appropriate office of the Department at the following locations:

Office of the Secretary: Office of Financial Operations, Room 705D, Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201

Public Health Service: PHS Claims Office, Room 18–20, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857

Social Security Administration: SSA Claims Office, P.O. Box 17042, Baltimore, Maryland 21235

Health Care Financing Administration: HCFA Claims Office, Division of Accounting, P.O. Box 17255, Baltimore, Maryland 21203

Family Support Administration: FSA Claims Office, Switzer Building, Room 2222, 330 C Street SW., Washington, DC 20201
Region I: Office of the General Counsel, John F. Kennedy Federal Building, Room 2047, Boston, Massachusetts 02203
Region II: Office of the General Counsel, Jacob K. Javits Federal Building, Room 3908, New York, New York 10278
Region III: Office of the General Counsel, 3535 Market Street, Room 9100, P.O. Box 13716, Philadelphia, Pennsylvania 19101
Region IV: Office of the General Counsel, 101 Marietta Tower, Room 221, Atlanta, Georgia, 30323
Region V: Office of the General Counsel, 18th Floor, 300 South Wacker Drive, Chicago, Illinois 60606
Region VI: Office of the General Counsel, 1200 Main Tower, Room 1330, Dallas, Texas 75202
Region VII: Office of the General Counsel, 601 East 12th Street, Room 535, Kansas City, Missouri 64106
Region VIII: Office of the General Counsel, 1961 Stout Street, Room 1106, Denver, Colorado 80294
Region IX: Office of the General Counsel, 50 United Nations Plaza, Room 420, San Francisco, California 94102
Region X: Office of the General Counsel, 2901 3rd Avenue, Room 580, Seattle, Washington, 98121.

(b) All other correspondence shall be addressed to the appropriate office as described in paragraph (a) of this section. All requests for review of Departmental records must be marked: *Attention: Records Inspection Request.*

[FR Doc. 88-15255 Filed 7-7-88; 8:45 am]
BILLING CODE 4150-04-M

45 CFR Part 85

Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Health and Human Services

AGENCY: Department of Health and Human Services.

ACTION: Final regulation.

SUMMARY: This regulation requires that the Department of Health and Human Services (HHS) operate all of its programs and activities to ensure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition of individual with handicaps and qualified individual with handicaps, and establishes a complaint mechanism for resolving allegations of discrimination. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal Executive Agencies.

EFFECTIVE DATE: September 6, 1988.

ADDRESS: Copies of this regulation are available in Spanish, in Braille and on tone-indexed tape. These may be obtained from Marcella Haynes, Director, Policy & Special Projects Staff, Office for Civil Rights, Room 5034, Wilbur J. Cohen Building, 330 Independence Avenue SW., Washington DC, 20201.

FOR FURTHER INFORMATION CONTACT: Frank E G Weil, (202) 245-6700. TDD (202) 472-2916.

SUPPLEMENTARY INFORMATION: On February 16, 1988, the Department of Health and Human Services (HHS) published a Notice of Proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs and activities conducted by HHS, 53 FR 4425.

By April 18, 1988, close of the comment period, HHS received eight comments. These included comments from the Department of Justice, which has government-wide coordination authority under section 504 and from the Equal Employment Opportunity Commission which has similar authority over allegations of discrimination in employment. In addition, comments were received from one Federal office, and from five organizations concerned with the interests of the handicapped.

HHS read and analyzed each comment; to the extent to which the comments focused on the language of the regulation, a discussion thereof and a decision thereon will be found below.

Copies of the written comments will continue to be available for inspection and copying from 9:00 a.m. to 5:00 p.m. on weekdays, except for legal holidays, in Room 5034, Wilbur J. Cohen Building, 330 Independence Avenue SW., Washington, DC, 20201.

Section 504 requires that this regulation be submitted to the appropriate authorizing committees of the Congress, and that the regulations may take effect no earlier than the thirtieth day after they have been so submitted. HHS has today submitted this regulation to the Senate Committee on Labor and Human Resources and to the House Committee on Education and Labor pursuant to the terms of section 504. The regulation will become effective on September 6, 1988.

Background

The purpose of this regulation is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Department of Health and Human Services. Section 504 states, in pertinent part, that:

> No otherwise qualified individual with handicaps in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*

(29 U.S.C. 794 (1978 amendment italicized).)

The substantive nondiscrimination obligations of the agency as set forth in this regulation are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. (*See* 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs) and 45 CFR Part 84 (section 504 regulations for federally assisted programs funded by HHS).) This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); *id.* at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this regulation and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. *See Dopico* v. *Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (*APTA*); *see also Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority*,

718 F.2d 490 (1st Cir. 1983), *Strathie* v. *Department of Transportation*, 716 F.2d 227 (3rd Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable modifications," *id.* at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that *reasonable* adjustments in the nature of the benefit offered must at times be made to assure meaningful access." *Id.* at 301 n.21 (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal government's regulations implementing section 504 for federally assisted programs, as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the Supreme Court in *Davis*, by lower courts interpreting *Davis* and by the Supreme Court in *Alexander*; therefore, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence, HHS believes that there are no significant differences between this regulation for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

Several commenters took the view that the decision in *Davis* was limited to an academic setting, and should not be applied outside that setting. HHS disagrees. It should be noted that *Alexander*, *APTA*, and *Strathie*, cited above, all deal with non-academic settings, and that *Davis* is cited and interpreted in each of them.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies on April 15, 1983, and of an amended prototype distributed by the Department of Justice on April 13, 1984. It was again reviewed by the Department of Justice following publication of the Notice of Proposed Rulemaking. At that time, the Department of Justice suggested a number of changes, largely non-substantive. These have been adopted.

This regulation has also been reviewed by the Equal Employment Opportunity Commission (EEOC) under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It was again reviewed by EEOC following publication of the Notice of Proposed Rulemaking. At that time, EEOC suggested a number of non-substantive changes, which have been adopted.

The regulation is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127). No regulatory impact analysis is required if a regulation applies only to the management of Federal agencies. This regulation applies only to the management of HHS. Therefore a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601–612).

This regulation contains no collections of information which require the approval of the Office of Management and Budget under the Paperwork Reduction Act of 1980.

One commenter maintained that Executive Order No. 12612 of October 26, 1987, requires all Federal agency rules to consider impact on State governmental programs and procedures, and that because States tend to enact statutes analogous to Federal statutes, a reference to Executive Order 12612 was required. This regulation relates solely to the Federal sector and deals with internal agency management. Such a reference is therefore, not required.

Section-by-Section Analysis of Regulation and Response to Comments

Where no discussion of comments follows the analysis of a section, no comments have been received thereon.

Section 85.1 Purpose.

Section 85.1 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section 85.2 Application.

The proposed regulation covers all programs and activities conducted by the Department of Health and Human Services ("HHS" or the "agency").

This includes the following components:

The Office of the Secretary
- Office of the Under Secretary
- Office of the Deputy Under Secretary
- Office of the Assistant Secretary for Public Affairs
- Office of the Assistant Secretary for Legislation
- Office of the Assistant Secretary for Planning and Evaluation
- Office of the Assistant Secretary for Management and Budget
- Office of the Assistant Secretary for Peronnel Administration
- Office of the General Counsel
- Office of Inspector General
- Office for Civil Rights
- Office of Consumer Affairs

Office of Human Development Services
- Office of the Assistant Secretary for Human Development Services
- Administration on Aging
- Administration for Children, Youth and Families
- Administration for Native Americans
- Administration on Developmental Disabilities

Public Health Service
- Office of the Assistant Secretary for Health
- Agency for Toxic Substances and Disease Registry
- Alcohol, Drug Abuse and Mental Health Administration
- Centers for Disease Control
- Food and Drug Administration
- Health Resources and Services Administration
- Indian Health Service
- National Institutes of Health

Health Care Financing Administration

Social Security Administration

Family Support Administration.

Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations, and those directly administered by the agency for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the agency's facilities. Activities in the second category include programs that provide Federal services or benefits.

This regulation does not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

The *major* programs subject to this regulation are listed below. Each of the components listed above occupies facilities which the public may have occasion to visit, engages in written and oral communication with the public, and hires Federal employees. In addition, some components operate programs which involve extensive public use, as summarized below:

Office of the Secretary—No major operating programs or activities conducted directly by the Federal government.

Office of Human Development Services—No major operating programs or activities conducted directly by the Federal government.[1]

Public Health Service—Directly operated programs include the Indian Health Service, and intramural research conducted by the National Institutes of Health.[1]

Health Care Financing Administration—Directly operates the Medicare program.[1]

Social Security Administration—Directly operates the Old Age, Survivors, and Disability Insurance, and Supplemental Security Income for the Aged, Blind, and Disabled programs.

Family Support Administration—No major operating programs or activities conducted directly by the Federal government.[1]

One commenter urged the inclusion of a program operated by one component of the Office of the Secretary, and for a list of all programs and activities to be appended to the regulation. In light of the fact that all programs and activities are covered, that a comprehensive list of ail programs would be very lengthy, and that such a list would have to be amended frequently as new programs are enacted and existing programs expire, the above list appears to be sufficient.

Section 85.3 Definitions.

"Agency." For purposes of this part "agency" means the Department of Health and Human Services or any component part of the Department of Health and Human Services that conducts a program or activity covered by this part. "Component agency" means any such component part.

"Assistant Attorney General." "Asistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 85.51(a)(1), they may also be necessary to meet other requirements of this regulation.

Two commenters suggested expanding the definition of "auxiliary aids" and one of them further suggested re-naming "auxiliary aids" to read "aids for reasonable accommodation" and specifically include the services of attendants.

The items set out in § 85.3 are clearly described as examples, and are not intended to constitute an exhaustive list. By giving examples rather than by including a list, other aids can be used, and, in appropriate cases, required, without amending the regulation. In certain instances, the services of attendants may indeed by appropriate; in those instances, they will fall under the definition in § 85.3. Therefore, there is no need to change the text of the regulations.

"Complete complaint." "Complete complaint" is defined to include all of the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180 day period for the agency's investigation (*see* § 85.61(g)) begins when the agency receives a complete complaint.

Two commenters stated their belief that the definition of "complete complaint" is too restrictive, and urged language which would give the complainant specific information as to what additional information is needed, and a further 30 days to submit such information, failing which the complaint would be dismissed without prejudice, and the complainant would be so informed.

Procedures similar to this suggestion are currently in place, and complainants will be given reasonable opportunities to complete the information submitted. There appears to be no need to spell these procedures out in the regulation.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs (28 CFR 41.3(f)), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted because the term "facility," as used in this part, refers to structures and not to intangible property rights. It should, however, be noted that this part applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used in §§ 85.41, 85.42, and 85.61(f).

One commenter proposed not to delete the phrase "or interest in such property." As previously stated, the phrase "or interest in such property" has been deleted because the term "facility," as used in this part, refers to structures and not to intangible property rights.

"Individual with Handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31), and the HHS regulation for federally assisted programs (45 CFR 84.3(j)). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of the amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

One commenter suggested that we add "sensory" to the phrase "physical or mental impairment." Since the definition set out in § 85.3 specifically includes the sense organs among the body systems whose impairment constitutes a handicap, we have not found it necessary to amend the regulation.

"OCR." "OCR" means the Office for Civil Rights of the Department of Health and Human Services.

"OCR Director/Special Assistant" means the Director of the Office for Civil Rights, who serves concurrently as the Special Assistant to the Secretary for Civil Rights, or a designee of the OCR Director/Special Assistant.

"Qualified individual with handicaps." The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32) and the HHS section 504

[1] Financial assistance programs conducted through grants to States and other recipients are covered by the section 504 rule for federally assisted programs at 45 CFR Part 84.

regulation for federally assisted programs (45 CFR 84.3(k)).

Paragraph (1) is an adaptation of existing definitions of "qualified handicapped person" for purposes of federally assisted preschool, elementary, and secondary education programs (*see, e.g.*, 45 CFR 84.3(k)(2)). It provides that an individual with handicaps is qualified for preschool, elementary, or secondary education programs conducted by the agency, if he or she is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive these services from the agency. In other words, an individual with handicaps is qualified if, considering all factors other than the handicapping condition, he or she is entitled to receive educational services from the agency.

Paragraph (2) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program other than those covered by paragraph (1) under which a person is required to perform services or to achieve a level of accomplishment. In such programs, a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in *Davis*.

In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.* at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," *Id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It, therefore, concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." *Id.* at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered, not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the purpose of the program.

One commenter proposed inserting the second sentence from the above paragraph into the regulatory text. We believe that the use of this language in the preamble is sufficient.

Another commenter commended HHS for the discussion of *Davis*, and the cases interpreting the *Davis* decision, in order to explain why the language of this part does not precisely track that of the regulations concerning federally assisted recipients (45 CFR Part 84). Two other commenters stated their view that incorporating *Davis* and *Alexander* into the regulation was unduly restrictive, and that the differences between this part and Part 84 would result in holding HHS to a lesser standard than HHS holds recipients of Federal financial assistance.

We believe that the Supreme Court's decision in *Davis* as well as the subsequent lower court decisions following *Davis* interpret section 504 and that it is necessary to reflect those decisions in the Department's regulation. The suggested changes are therefore not being adopted.

The agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in §§ 85.42(a) and 85.51(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens to the agency. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources which are legally available to the agency for the purpose, and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

Two commenters suggested that the total resources of the agency be considered in determining "undue burden." Because many Department funds are earmarked for specific purposes and are therefore unavailable for use elsewhere, the entire agency budget is not an appropriate consideration.

For programs or activities which do not fall under either of the first two paragraphs, paragraph (3) adopts the existing definition of "qualified handicapped person" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

Paragraph (4) explains that "qualified individual with handicaps" means "qualified handicapped person" as that term is defined for purposes of employment in the EEOC regulation at 29 CFR 1613.702(f), which is made applicable to this part by § 85.31. Nothing in this part changes existing regulations pertaining to employment.

One commenter proposed using the general section 504 definition of "qualified handicapped person" in employment cases rather than the definition of the EEOC regulation. The definition has been supplied by the Equal Employment Opportunity Commission which coordinates all employment discrimination matters throughout the government. It is also the Department's view that it is important to have a uniform definition of what constitutes employment discrimination throughout the Federal government.

"Secretary" means the Secretary of the Department of Health and Human Services or the Secretary's designee.

"Section 504". This definition makes clear that, as used in this part, "section 504" applies only to programs or activities conducted by the agency itself and not to programs or activities to which it provides Federal financial assistance.

Section 85.11 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination

regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)) and the HHS regulations for federally assisted programs (45 CFR 84.6(k)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

One commenter stated that a three-year retention period is insufficient, and proposed that self-evaluations be kept indefinitely. The regulation requires the self-evaluation to be kept for a minimum of three years, but does not include a maximum. It is expected that the self-evaluation will be retained for the period provided in current document retention policies.

Another commenter proposed that copies of the self-evaluation be made available for copying as well as for public inspection. This proposal has been adopted.

A further commenter proposed the inclusion of provisions for assurances, transition plans and specific modification requirements. We believe that while assurances are appropriate—and can be specifically enforced—in section 504 regulations for federally assisted programs or activities, all of the entities involved in this part are under the control of the Secretary, who can issue the necessary directives; assurances are therefore not required.

The final rule provides for participation in the self-evaluation process by individuals with handicaps or organizations representing individuals with handicaps by submitting comments, which may include the development of transition plans. It is expected that component agencies will consult with individuals with handicaps among their own staff in the course of preparing self-evaluations.

Because modification requirements are intended to address any potential problems in the agency's programs or activities, they are not specified in the regulation.

Section 85.12 Notice.

Section 85.12 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of the rights and protections afforded by section 504 and this part. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities or in connection with recruitment; the display of informative posters in service centers and other public places; or the broadcasting of information by television or radio.

One commenter suggested the inclusion of a reference to recruitment materials in the above examples. Such a reference has been included.

Section 85.21 General prohibitions against discrimination.

Section 85.21 is an adaptation of the corresponding section of the section 504 coordination regulation for programs and activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 85.21 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the part. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in § 85.21. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices could result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (*e.g.*, epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (§§ 85.41–43) and communication (§ 85.51) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies, as well as the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enuciated in § 85.21(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement

contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the agency from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certifications. A person is a "qualified individual with handicaps" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (*see* § 85.3).

In addition, the agency may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. For example, the agency must comply with this requirement when establishing safety standards for the operations of licensees. In that case, the agency must ensure that the standards it promulgates do not discriminate against the employment of qualified individuals with handicaps in an impermissible manner.

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities; nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity and thereby indirectly affect limited aspects of their operations.

One commenter suggested pointing out that Federal licensees or certified entities, having received services from Federal employees during the process of licensing or certification, thereby become Federally assisted recipients, and are covered by 45 CFR Part 84. Such an argument is beyond the scope of this part, and is therefore not being included.

Another commenter suggested including language such as that found in 45 CFR 84.4(b)(1) to the effect that agencies may not perpetuate discrimination against qualified individuals with handicaps by providing significant assistance to an agency, organization or person that discriminates on the basis of handicap. Assistance from the agency that would provide significant support to an organization constitutes Federal financial assistance and the organization, as a recipient of such assistance, would be covered by the section 504 regulation for federally assisted programs.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to individuals those with handicaps.

Paragraph (d) provides that the agency must administer programs and activities in the most integrated setting appropriate to the next of qualified individuals with handicaps, *i.e.* in a setting that enables individuals with handicaps to interact with nonhandicapped individuals to the fullest extent possible.

Section 85.31 Employment.

Section 85.31 prohibits discrimination on the basis of handicap in employment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner* v. *Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith* v. *United States Postal Service*, 742 F.2d 257, 259–60 (6th Cir. 1984); *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 302–04 (5th Cir. 1981). *Contra McGuiness* v. *United States Postal Service*, 744 F.2d 1318, 1320–21 (7th Cir. 1984); *Boyd* v. *United States Postal Service*, 752 F.2d 410, 413–14 (9th Cir. 1985).

Courts uniformly have held that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Morgan* v. *United States Postal Service*, 798 F.2d 1162, 1164–65 (8th Cir. 1986); *Smith*, 742 F.2d at 262; *Prewitt*, 662 F.2d at 304. Accordingly, § 85.31 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the EEOC at 29 CFR Part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap.

One commenter proposed that the general definition of "qualified individual with handicaps" be used in this section, instead of that used under section 501. We believe that the above paragraphs sufficiently explain the need for using the section 501 definition.

In addition to this section, § 85.61(c) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

Section 85.41 Program accessibility: Discrimination prohibited.

Section 85.41 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 85.42 and 85.43.

Section 85.42 Program accessibility: Existing facilities.

This part adopts the program accessibility concept found in the existing section 504 coordination regulation form programs or activities receiving Federal financial assistance (28 CFR 41.57) with certain modifications. Thus, § 85.42 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The part also makes clear that the agency is not required to make each of its existing facilities accessible (§ 85.42(a)(1)). However, § 85.42, unlike 28 CFR 41.57, places explicit limits on the agency's obligation to ensure program accessibility (§ 85.42(a)(2)).

One commenter stated that the provisions of § 85.42(a)(1) were negatively worded and may reflect a misinterpretation of the decision of the Supreme Court in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), and argued for deletion of this language.

The language is identical to that in the section 504 regulation for federally assisted programs or activities. We believe that the inclusion of this language is necessary in order to make clear that, while every aspect of every Federal program or activity need not be accessible, each program or activity, when viewed as a whole, must be accessible.

Another commenter recommended adding the language "where other methods are equally effective in achieving compliance" from § 84.42(b) to § 84.42(a)(1). We believe that, because §§ 84.42 (a) and (b) treat different aspects of the subject, their language must necessarily differ.

Paragraph (a)(2) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement, the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity, or in undue financial and administrative

burdens. A similar limitation is provided in § 85.51(d). This provision is based on the Supreme Court's holding in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. *See, e.g., Dopico* v. *Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

Paragraph (a)(2) and § 85.51(d) are also supported by the Supreme Court's decision in *Alexander* v. *Choate*, 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. *Id* at 299.

Relying on *Davis*, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits the grantee offers," *id.* at 301, and that "*reasonable adjustments* in the nature of the benefit offered must at times be made to assure meaningful access." *Id.* n.21 (emphasis added). However, section 504 does not require "'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration[s] in the nature of a program.'" *Id.* at n.20 (citations omitted). *Alexander* supports the position, based on *Davis* and the earlier lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with § 85.42(a) would in most cases not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with § 85.42(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee, and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedures established in § 85.61. The opportunity to file such a complaint responds to one commenter's suggestion that review by a high level Department official be assured.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

One commenter proposed that methods other than structural changes to ensure accessibility should be "equally effective". The regulations implementing section 504 for federally assisted programs do not contain such language. The addition of the proposed language would impose a regulatory standard on the Department not required of recipients. In view of the fact that the 1978 amendments were intended to apply the same requirements to federally conducted programs as apply to federally assisted programs, the proposed language is not being adopted.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three (3) years after the effective date of this part. Where structural modifications are required and it is not expected that these can be completed within six months, a transition plan should be developed within six months of the effective date of this part. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

One commenter proposes to limit the time allowed for making structural modifications to one year. We note that the basic requirement is that these changes be made "as soon as practicable," and that the three-year limit is the maximum period of time. Furthermore, the three-year maximum for transition plans is identical to that contained in the regulations for federally assisted recipients.

Section 85.43 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction and alterations under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). Section 85.43 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR Part 101–19, 101–19.600 to 101–19.607 (GSA regulation which incorporates the Uniform Federal Accessibility Standards). This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as

amended (42 U.S.C. 4151–4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standards for existing facilities in § 85.42. To the extent the buildings are newly constructed or altered, they must also meet the new constructions and alteration requirements of § 85.43.

Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes that same program accessibility standards should apply to both owned and leased existing buildings.

In *Rose* v. *United States Postal Service*, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the question of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of this issue. Two commenters urged that leased buildings be required to be accessible at the time of lease. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 85.51 Communications.

Section 85.51 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 85.1(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (§ 85.51(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 85.51(d). That paragraph limits the obligations of the agency to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see supra* preamble discussion of § 85.42(c)(2)). Unless not required by § 85.51(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

One commenter proposed that the choice of auxiliary aid made by the individual with handicaps should govern unless it would constitute an undue hardship on the agency. We believe that the language set out above is adequate to ensure consideration of an individual's preference.

Another commenter proposed that the regulation require all films and videotapes produced by the agency to be captioned for the hearing-impaired. The Department intends to examine all appropriate methods of ensuring effective communication.

The same commenter applauded HHS for the inclusion of the language requiring HHS to inform individuals with handicaps of their section 504 rights.

The discussion of § 85.42(a), Program accessibility, Existing facilities, regarding the determination of what constitutes undue financial and administrative burdens, also applies to § 85.51(d) and should be referred to for a complete understanding of the agency's obligation to comply with § 85.51.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (*e.g.* a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate.

One commenter proposed changing the language to state that notepads rarely suffice for communication with the hearing-impaired. Considering that a significant number of the hearing-impaired may not be skilled in sign language, we believe that the language used is appropriate.

For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs and activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in proceedings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceedings of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (§ 85.51(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

One commenter proposed that the items which agencies are not required to provide and the circumstances involved be described in more detail. We believe that the description given is sufficient, because the interpretation of this provision will be made on a case-by-case basis.

Paragraph (b) requires the agency to ensure that individuals with handicaps can obtain information concerning accessible services, activities, and facilities.

Paragraph (c) requires the agency to provide signage at inaccessible facilities that direct users to locations with information about accessible facilities.

One commenter suggested specifically mentioning the international symbol for deafness, and placing such signs at the main entrance of buildings equipped to service the hearing-impaired. We believe that the language contained in §§ 85.51 (b) and (c) requires the agency to ensure that individuals with handicaps, including those with impaired hearing, can obtain information regarding accessibility, and that this requirement is sufficient to afford flexibility on the part of the agency regarding use of appropriate signage.

One commenter proposed adding the words "in the most integrated setting

appropriate" to the language in § 85.51(d). This language already appears elsewhere in the regulation, *e.g.* in § 85.42(b)(2), and it is the Department's intention to act in accordance with that provision.

Section 85.61 Compliance procedures.

Paragraph (a) specifies that paragraphs (b) and (d) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (c) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (b) designates the official responsible for coordinating implementation of § 85.61. The NPRM stated that responsibility for the implementation and operation of this "part" shall be vested in the OCR Director/Special Assistant. The final rule has been revised by replacing the word "part" with the word "section" to clarify the responsibility for coordinating implementation of § 85.61.

The agency is required to accept and investigate all complete complaints (§ 85.61(d)). Two commenters suggested that a complainant have an opportunity to remedy an incomplete complaint. Current administrative procedures provide for this practice and it need not be included in the text of the regulation.

If the agency determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (§ 85.61(e)). One commenter pointed out that where a reference to another entity of the Federal government is required, the obligation to refer should be absolute, not limited to reasonable efforts. The language "shall make reasonable efforts to refer" is not intended to minimize the Department's obligation.

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board (ATBCB) upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (§ 85.61(g)). One appeal within the agency shall be provided (§ 85.61(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance.

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

Commenters have suggested the following:

Notifying complainants whenever their complaints are referred to another agency. Current administrative procedures provide for this practice and it need not be included in the text of the regulation.

Describing the basic parameters for submitting or obtaining evidence used to decide appeals. Since the grounds for appeal may be extremely varied, it would not be practicable to set out parameters for every appeal.

Including a statement as to complainants' rights to judicial review. These rights are statutory and beyond the scope of this regulation.

Obtaining the expertise of ATBCB in appropriate cases. A provision regarding notification of ATBCB is already included in the regulation.

Including a statement that all other regulations, forms and directives issued by HHS are superseded by the nondiscrimination requirements of this part. The Department views any other issuances falling short of the requirements of this regulation as insufficient to ensure compliance and therefore such a statement is unnecessary.

Provisions for attorneys fees and compensation to the prevailing party. Such provisions are statutory and beyond the scope of this regulation.

Section 85.62 Coordination and compliance responsibilities.

Section 85.62 sets out the respective responsibilities of the components of HHS and of the Director, OCR/Special Assistant in the implementation of section 504 to programs and activities conducted by HHS.

Paragraph (c) specifies the respective roles of OCR and of the HHS component in cases in which noncompliance is found.

In the event that OCR and the HHS component cannot agree on a resolution of any particular matter, such matter will be submitted to the Secretary for resolution.

List of Subjects in 45 CFR Part 85

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

Date: June 17, 1988.

Otis R. Bowen,

Secretary.

For the reasons set forth in the preamble, Title 45 of the Code of Federal Regulations is amended by adding a new Part 85, as follows:

PART 85—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Sec.

Authority: 29 U.S.C. 794.

§ 85.1 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 85.2 Application.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 85.3 Definitions.

For purposes of this part, the term—

"Agency" means the Department of Health and Human Services or any component part of the Department of Health and Human Services that conducts a program or activity covered by this part. "Component agency" means such component part.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's) interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with Handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(3) "Has a record of such impairment" means has a history of, or is misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation.

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

"OCR" means the Office for Civil Rights of the Department of Health and Human Services.

"OCR Director/Special Assistant" means the Director of the Office for Civil Rights, who serves concurrently as the Special Assistant to the Secretary for Civil Rights, or a designee of the Director/Special Assistant.

"Qualified individual with handicaps" means:

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive educational services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a particular level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; and

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §85.31.

"Secretary" means the Secretary of the Department of Health and Human Services or his/her designee.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); the Rehabilitation Act Amendments of 1986 (Pub. L 99–566, 100 Stat. 1810); and the Civil Rights Restoration Act of 1987 (Pub. L. 100–259, 102 Stat. 28). As used in this part, section 504 applies only to programs or activities conducted by the agency and not to federally assisted programs.

§§ 85.4–85.10 [Reserved]

§ 85.11 Self-evaluation.

(a) The agency shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications. Any new operating or staff divisions established within the agency shall have one year from the date of their establishment to carry out this evaluation.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection and copying—

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 85.12 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such a manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

§§ 85.13–85.20 [Reserved]

§ 85.21 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b) (1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with handicaps or to any class or individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aids, benefits or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of individuals without handicaps from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 85.22–85.30 [Reserved]

§ 85.31 Employment.

No qualified individuals with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (9 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 9 CFR Part 1613, shall apply to employment in federally conducted programs and activities.

§§ 85.32–85.40 [Reserved].

§ 85.41 Progarm accessibility: Discrimination prohibited.

Except as otherwise provided in § 85.42, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by such persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 85.42 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 85.42(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity in question, and must be accompanied by a written statement of reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would

not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* (1) The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it.

(2) In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section within 60 days of the effective date of this part except where structural changes in facilities are undertaken; such changes shall be made within three years of the effective date of this part, but, in any event, as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities must be undertaken to achieve program accessibility, and it is not expected that such changes can be completed within six months, the agency shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for the implementation of the plan.

§ 85.43 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, or on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157) as established in 41 CFR 101–19.600 to 101–19.607 apply to buildings covered by this section.

§§ 85.44–85.50 [Reserved]

§ 85.51 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunications devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 85.51 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity in question and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 85.52–85.60 [Reserved]

§ 85.61 Compliance procedures.

(a) Except as provided in paragraph (c) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) Responsibility for the implementation and operation of this section shall be vested in the CCR Director/Special Assistant.

(c) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and HHS Instruction 1613–3. Part 1613 requires complainants to obtain pre-complaint counseling within 30 days of the alleged discriminatory act, and to file complaints within 15 days of the close of counseling. Responsibility for the acceptance, investigation, and the rendering of decisions with respect to employment complaints is vested in the

Assistant Secretary for Personnel Administration.

(d) OCR shall accept the investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. OCR may extend this time for good cause.

(e) If OCR receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Federal government entity.

(f) OCR shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, OCR shall notify the complainant of the results of the investigations in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 60 days of receipt from the agency of the letter required by § 85.61(g). OCR may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the OCR Director/Special Assistant. Decisions on such appeals shall not be heard by the person who made the initial decision.

(j) OCR shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If OCR determines that it needs additional information from the complainant, it shall have 60 days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in (g) and (j) above may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to a component agency or other Federal agencies, except that the authority for making the final determination may not be delegated.

§ 85.62 Coordination and compliance responsibilities.

(a) Each component agency shall be primarily responsible for compliance with this part in connection with the programs and activities it conducts.

(b) The OCR Director/Special Assistant shall have the overall responsibility to coordinate implementation of this part. The OCR Director/Special Assistant shall have authority to conduct investigations, to conduct compliance reviews, and to initiate such other actions as may be necessary to facilitate and ensure effective implementation of and compliance with, this part.

(c) If as a result of an investigation or in connection with any other compliance or implementation activity, the OCR Director/Special Assistant determines that a component agency appears to be in noncompliance with its responsibilities under this part, OCR will undertake appropriate action with the component agency to assure compliance. In the event that OCR and the component agency are unable to agree on a resolution of any particular matter, the matter shall be submitted to the Secretary for resolution.

§ 85.63–85.99 [Reserved]

[FR Doc. 88–15382 Filed 7–7–88; 8:45 am]
BILLING CODE 4150–04–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PR Docket No. 87–312]

Amendment To Permit Commercial Enterprises To Be Licensed Directly in the Special Emergency Radio Service; Private Land Mobile Services

AGENCY: Federal Communications Commission.

ACTION: Report and order amending rules in the Private Land Mobile Radio Services.

SUMMARY: In response to a petition for rule making, the Commission adopted a Report and Order to permit private entrepreneurs or "private carriers" to be licensed in the Special Emergency Radio Service (SERS). This action will make a new communications option available to eligible SERS end users. The Report and Order also eliminates secondary uses of eight channels known as "MED" channels 1 through 8 to ensure that these channels will be available for emergency medical communications.

EFFECTIVE DATE: July 25, 1988 for licensing private carriers; July 1, 1990 for eliminating secondary use of MED channels 1 through 8.

FOR FURTHER INFORMATION CONTACT: Irene Bleiweiss, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634–2443.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, PR Docket No. 87–312, adopted on May 18, 1988 and released June 13, 1988. The full text of the Order is available for inspection and copying during normal business hours in the FCC Private Radio Bureau, Land Mobile and Microwave Division, Rules Branch (Room 5126), 2025 M Street NW., Washington, DC. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, 2100 M Street NW., Suite 140, Washington, DC 20037, (202) 857–3800.

Summary of Report and Order

1. In response to a December 1986 petition for rule making and a September 1987 notice of proposed rule making, the Commission issued a Report and Order amending licensing rules applicable to the Special Emergency Radio Service (SERS). The SERS is a private land mobile radio service available to medical services, rescue squads, disaster relief organizations, and seven additional categories of eligible end users. Under present rules, these eligible SERS users have only limited communications service options. To expand options available to eligible users and promote the efficient and effective use of the SERS frequencies, the Report and Order permits private entrepreneurs or "private carriers" to be licensed in the SERS.

2. Under the private carrier concept, entrepreneurs would apply to the Commission to be licensed in the SERS. Once licensed, the entrepreneurs would build communications systems and offer service only to eligible end users. Private carriers would be required to observe existing restrictions on the permissible use of the SERS frequencies. The private carriers would be responsible for all aspects of system operation including licensing, maintenance and compliance with Commission rules. The Commission will permit private carriers to serve eligible end users on all SERS frequencies below 800 MHz, including those channels reserved for medical service eligibles.

3. In the Notice of Proposed Rule Making, the Commission asked whether it should eliminate secondary use of ten channels known as "MED" channels 1 through 10. On a primary basis these